Phrueksa Taemchim (Thailand) v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–436 OF 2010
APANDI ALI, LINTON ALBERT AND HAMID SULTAN JJCA
30 JULY 2013

Criminal Law — Dangerous drugs — Statutory presumption — Whether trial court correctly invoked statutory presumption of trafficking against accused — Accused had swallowed large quantity of capsules of cocaine and passed them out at hospital — Whether custody control and possession of drugs proven to attract presumption of trafficking — Whether concealing drugs in stomach and transporting them fell within s 2 of the Dangerous Drugs Act 1952 definition of trafficking — Dangerous Drugs Act 1952 ss 37(d) & 37(da)

The appellant was convicted and sentenced to death by the High Court for trafficking in 713.79g cocaine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). He was detained at a bus station and taken to the general hospital where an x-ray showed he had swallowed 98 capsules of the drug. Medication was given for him to pass the capsules out. In his instant appeal against conviction and sentence, the appellant contended, inter alia, that the trial judge was wrong to have invoked the presumption of trafficking against him under s 37(da) of the DDA as only custody and control of the drug had been proved against him and not knowledge. He also said the prosecution's failure to call the radiologist to testify as to the x-ray evidence and the failure of the police witness to tender a certificate under s 90A of the Evidence Act 1950 ('Act') with regard to the photographs tendered in evidence were fatal to the prosecution's case.

Held, dismissing the appeal:

(1) The submission that it was wrong of the trial judge to have applied s 37(da) of the DDA was without merit. The fact that the cocaine was found in the appellant's stomach and recovered when he excreted the capsules satisfied the element of custody and control inclusive of possession by operation of law by virtue of s 37(d). In addition, the fact that the drug was concealed in the stomach and was transported attracted at least more than two grounds stated in s 2 of the DDA ie 'concealing, transporting' etc (see para 39(a)).

(2) The positive element as opposed to the passive conduct to show intention to trade or deal in the drug to attract trafficking was satisfied by the

irresistible inference proposition to drive home the charge of trafficking pursuant to s 2 of the DDA without any reliance on s 37(d) or 37(da) (see para 39(a)).

(3) On the factual matrix of the case, without reliance on s 2 of the DDA and s 37(d) per se, trafficking could be established pursuant to s 37(da) by applying the irresistible inference proposition (see para 39(b)).

(4) Section 37(d) or 37(da) came into force by operation of law with a caveat that s 37(da) could not be sustained if s 37(d) necessarily had to be used to supplement the ingredient of knowledge ie the rule against double presumption. It did not matter on issues of law what the trial judge said about ss 2 or 37(d) or 37(da). If there was overwhelming evidence of trafficking according to law, the appellate court was at liberty to apply s 60 of the Courts of Judicature Act 1964 if the law required a conviction. The application of s 37(d) or 37(da) only imposed on the accused to speak of his innocence to earn a conviction for possession or to obtain an acquittal and nothing more (see para 43).

(5) The appellant's complaint in respect of the x-ray or photographs or s 90A of the Act had no significant value per se as the fact of recovery of the drug from his body had not been challenged (see para 6).

(6) There was sufficient material to support the charge against the appellant and the trial court had taken a reasonable view of the evidence and it had followed *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 direction and rightly applied the maximum evaluation and beyond reasonable doubt tests (see para 44).

[Bahasa Malaysia summary

Perayu disabitkan dan dihukum mati oleh Mahkamah Tinggi kerana mengedar kokain seberat 713.79g, kesalahan di bawah s 39(B)(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Dia ditangkap di stesen bas dan dibawa ke hospital di mana x-ray menunjukkan yang dia menelan 98 kapsul dadah tersebut. Ubat telah diberi kepadanya untuk mengumuhkan kapsul-kapsul tersebut. Dalam rayuan ini terhadap sabitan dan hukuman, perayu berhujah, antara lain, bahawa hakim perbicaraan salah kerana membangkitkan anggapan mengedar terhadapnya di bawah s 37(da) ADB kerana hanya jagaan dan kawalan terhadap dadah telah dibuktikan terhadapnya dan bukan pengetahuan. Dia juga menyatakan kegagalan pihak pendakwaan untuk memanggil pakar radiologi memberi keterangan mengenai keterangan x-ray dan kegagalan saksi polis untuk menyerahkan sijil di bawah s 90A Akta Keterangan 1950 ('Akta') berkaitan fotograf yang diserahkan sebagai keterangan adalah penting kepada kes pihak pendakwaan.

Diputuskan, menolak rayuan:

(1) Hujahan bahawa hakim perbicaraan telah tersalah mengguna pakai

s 37(da) ADB adalah tanpa merit. Fakta bahawa kokain didapati di dalam perut perayu dan diperolehi apabila dia mengumuhkan kapsul-kapsul tersebut memenuhi unsur jagaan dan kawalan termasuk milikan dengan operasi undang-undang mengikut s 37(d). Selanjutnya, fakta bahawa dadah disembunyikan di dalam perut dan dibawa mencetuskan sekurang-kurangnya lebih dua alasan yang dinyatakan di dalam s 2 ADB iaitu 'concealing, transporting' dan lain-lain (lihat perenggan 39(a)).

(2) Unsur positif bertentangan tindakan pasif untuk menunjukkan niat untuk berniaga atau berurusan dengan dadah untuk melakukan pengedaran dipenuhi oleh cadangan inferens munasabah untuk membuktikan tuduhan pengedaran berikutan s 2 ADB tanpa bergantung kepada ss 37(d) atau 37(da) (lihat perenggan 39(a)).

(3) Atas matriks kes, tanpa bergantung ke atas s 2 ADB dan s 37(d) itu sendiri, pengedaran boleh dibuktikan berikutan s 37(da) dengan mengguna pakai cadangan inferens munasabah (lihat perenggan 39(b)).

(4) Seksyen 37(d) atau 37(da) berkuat kuasa atas operasi undang-undang dengan kaveat bahawa s 37(da) tidak dapat dikekalkan jika s 37(d) secara perlu terpaksa digunakan untuk menambah unsur pengetahuan iaitu peraturan terhadap anggapan berganda. Tidak menjadi masalah atas isu undang-undang apa yang dikatakan oleh hakim perbicaraan mengenai ss 2 atau 37(d) atau 37(da). Jika terdapat keterangan yang kukuh mengenai pengedaran mengikut undang-undang, mahkamah rayuan bebas untuk mengguna pakai s 60 Akta Mahkamah Kehakiman 1964 jika undang-undang memerlukan sabitan. Penggunaan s 37(d) atau 37(da) hanya dikenakan ke atas tertuduh untuk membela diri untuk mendapatkan sabitan untuk milikan atau memperolehi pembebasan dan bukan yang lain (lihat perenggan 43).

(5) Aduan perayu berkaitan x-ray atau fotograf atau s 90A Akta tidak mempunyai nilai penting memandangkan fakta pemerolehan dadah tersebut daripada badannya tidak dibantah (lihat perenggan 6).

(6) Terdapat material yang mencukupi untuk menyokong tuduhan terhadap perayu dan mahkamah perbicaraan telah mengambil pandangan yang munasabah terhadap keterangan dan ia telah mengikut arahan kes *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 dan mengguna pakai dengan betul penilaian maksimum dan ujian-ujian melampaui keraguan yang munasabah (lihat perenggan 44).]

Notes

For cases on statutory presumption, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 201–204.

Cases referred to

Chan Pean Lean v PP [1956] 1 MLJ 237 (refd)
Choo Yoke Choy v PP [1992] 2 MLJ 632, SC (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137, SC (refd)
Hasbala Mohd Sarong v PP [2013] 6 MLJ 636, FC (refd)
Ibrahim Mohamad v PP [2011] 4 CLJ 113, FC (distd)
Isidro Leonardo Quito Cruz v PP [2013] 2 MLJ 1, FC (refd)
Kasanda Emmanuel lwn Pendakwa Raya [2013] 2 MLJ 833, CA (refd)
Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2013] 2 MLJ 650, CA (refd)
Lee Chee Meng v PP [1992] 1 MLJ 322; [1992] 1 CLJ 345, SC (refd)
Leow Nghee Lim v Reg [1956] 1 MLJ 28 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (folld)
Mohd Nizar Fakhri bin Badri v PP [2013] 2 MLJ 291, CA (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
Munuswamy Sundar Raj v PP [2013] 5 MLJ 48; [2013] ILNS 183, CA (refd)
Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)
Ong Lock Soon v PP [2012] 2 MLJ 641, CA (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1, FC (distd)
PP v Chia Leong Foo [2000] 6 MLJ 705, HC (refd)
PP v Denish a/l Madhavan [2009] 2 MLJ 194; [2009] 2 CLJ 209, FC (refd)
PP v Jorge Enrique Pellon Tellon [1998] 4 MLJ 183, CA (not folld)
PP v Kau Joo Huat [1988] 2 MLJ 91; [1988] 1 CLJ Rep 258, SC (refd)
PP v Mohd Aszzid Abdullah [2008] 1 MLJ 281, HC (refd)
PP v Mohd Farid bin Sukis & Anor [2002] 3 MLJ 401, HC (refd)
PP v Ramli Long & Anor [1993] 1 MLJ 93, HC (refd)
PP v Suzie Adrina bte Ahmad [2006] 5 MLJ 135, CA (refd)
PP v Yuyaraj [1969] 2 MLJ 89, PC (refd)
Ramis a/l Muniandy v PP [2001] 3 SLR 534, CA (folld)
Rozmi bin Yusof v PP [2013] 5 MLJ 66; [2013] 4 CLJ 384, CA (refd)
Saad Ibrahim v PP [1968] 1 MLJ 158 (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630, FC (refd)
Sochima Okoye v PP [1995] 1 MLJ 538, CA (refd)
Teh Geok Hock v PP [1989] 3 MLJ 162, SC (refd)
Tong Kam Yew & Anor v PP [2013] 4 MLJ 888; [2013] 3 AMR 248, CA (refd)
Tong Peng Hong v PP [1955] 1 MLJ 232 (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259, FC (refd)
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (folld)
Woolmington v Director of Public Prosecutions [1935] AC 462, HL (refd)
Zaifull bin Muhammad v PP and another appeal [2013] 2 MLJ 348; [2013] 2 CLJ 383, FC (refd)
Zulfikar bin Mustaffah v PP [2001] 1 SLR 633, CA (folld)
Zulkifli bin Md Rodzi v PP [2013] 3 MLJ 745; [2013] 4 CLJ 250, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60
Dangerous Drugs Act 1952 ss 2, 37, 37(d), (da), 39A(2), 39B(1), (1)(a), (2)
Evidence Act 1950 ss 4, 27, 90A
Federal Constitution art 5(1)
Immigration Act 1959/63 s 2
Penal Code s 34

Appeal from: Suit No 45–62 of 2009 (High Court, Kuala Lumpur)

K Vicknesvaran (Viknes Ratna & Co) for the appellant.
Nadia Hanim bt Mohd Tajuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant's appeal against conviction and sentence of death pursuant to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA 1952') came up for hearing on 22 May 2013 and on the same day we heard the appeal and dismissed the same. My learned brothers Mohamed Apandi bin Hj Ali JCA and Linton Albert JCA have read and approved the judgment. This is our judgment.

[2] The accused was charged under s 39B(1)(a) of the DDA 1952 which reads as follows:

> Bahawa kamu pada 3 Julai 2009 jam lebih kurang 8.30 pagi di Hentian Puduraya, di dalam daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur, telah mengedar dadah berbahaya iaitu 713.79 gram kokain, oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

The English translation will read as follows:

> That you on 3 July 2009 at about 8.30 am at Puduraya Station, in the Dang Wangi District, had trafficked in dangerous drugs, 713.79 grams of cocaine, thereby committed an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952, punishable under section 39B(2) of the same Act.

[3] The petition of appeal reads as follows:

> 1. Hakim Bicara Yang Bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila mensabitkan Perayu di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan menjatuhkan hukuman mati di bawah Seksyen 39B(2) Akta yang sama. Hakim Bicara Yang Bijaksana terkhilaf

dari segi fakta dan undang-undang apabila membuat penemuan bahawa Pendakwaan telah membuktikan kesnya melampaui keraguan munasabah mengikut seksyen 182A KPJ.

2. Hakim Bicara Yang Bijaksana telah terkhilaf dari segi fakta dan undang-undang kerana keterangan SP1 ASP Zainal bercanggah dan SP1 gagal melampirkan sijil di bawah seksyen 90A Akta Keterangan.

3. Hakim Bicara Yang Bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila beliau tidak mengambil kira keterangan tertuduh iaitu kewujudan transit tiket dan pendakwaan menggunapakai definasi transit mengikut Akta Imigresen 1963 dan tidak mengikut definasi transit mengikut Akta Dadah Berbahaya 1952.

4. Hakim Bicara Yang Bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila tidak memberi pertimbangan yang lebih mendalam mengenai tarikh kehadiran perayu di Malaysia. Namun pihak pendakwaan tidak mencabar kebolehpercayaan saksi pembelaan dan membuktikan tarikh kemasukkan perayu ke Malaysia. Dan tarikh ditahan di Hentian Puduraya.

5. Hakim Bicara Yang Bijaksana telah terkhilaf dari segi fakta dan undang-undang kerana pihak pendakwaan gagal memanggil pakar x-ray.

6. Hakim Bicara Yang Bijaksana telah terkhilaf dari segi fakta dan undang-undang kerana mengikut Alasan Penghakiman menyatakan intipati pemilikan telah dibuktikan tanpa perlu gantung atas anggapan di bawah seksyen 37(d).

7. Hakim Bicara Yang Bijaksana telah terkhilaf dari segi fakta dan undang-undang kerana gagal menggunapakai prinsip yang diutarakan dalam kes *Mohamad Radhi Yaakob v Public Prosecutor* [1981] 1 CLJ 311 (Rep) 'To satisfy this test, of importance is not the words used by the Judge but rather the actual application of the test to the facts of the case. In this case, the learned Judge offered practically no reason why the defence notwithstanding its falsity and unconvincing nature, had failed to cast a reasonable doubt on the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal'.

The English translation of the petition of appeal reads as follows:

1. The learned Judge erred in fact and law when he convicted the Appellant under section 39B(1)(a) of the Dangerous Drugs Act 1952 and sentenced to death under section 39B(2) of the same Act. The Learned judge erred in fact and law when he made a finding that the prosecution had proven the case beyond reasonable doubt according to section 182A CPC.

2. The learned Judge erred in fact and law as there were contradictions in the testimony of SP1 ASP Zainal and SP1 failed to tender certificate under section 90A of the Evidence Act.

3. The learned trial Judge erred in fact and law when he did not consider the evidence of the Accused on the existence of the transit ticket and the

prosecution applied the definition of transit under the Immigration Act 1963 and not the definition under the Dangerous Drugs Act 1952.

4. The learned trial Judge erred in law in fact and law when he did not consider the date the Appellant arrived in Malaysia. However, the prosecution did not challenge the credibility of the defence witness to prove the entry date and the arrest date at Puduraya Station.

5. The learned trial Judge erred in fact and law when the prosecution failed to call X-ray expert.

6. The learned trial Judge erred in fact and law, the Grounds of Judgment stated the element of possession was proven without relying on presumption under section 37(d).

7. The learned trial Judge erred in fact and law by failing to adopt the principle in the case of *Mohamad Radhi Yaakob v Public Prosecutor* [1981] 1 CLJ 311 (Rep) 'To satisfy this test, of importance is not the words used by the Judge but rather the actual application of the test to the facts of the case. In this case, the learned Judge offered practically no reason why the defence notwithstanding its falsity and unconvincing nature, had failed to cast a reasonable doubt on the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal'.

Based on the above grounds the Appellant prays the conviction and sentence be set aside.

THE BRIEF FACTS

[4] The arrest of the appellant and subsequent recovery of the drugs in consequence of 98 capsules containing the drugs which had been swallowed by the appellant was recovered through the process of excretion (faeces) at the General Hospital. In the instant case the appellant was detained in Puduraya and thereafter brought to the hospital where x-ray was taken and the drugs located in the stomach was subsequently recovered.

[5] Learned counsel for the appellant in the submission complains as follows:

(a) failure of SP1 to tender a certificate under s 90A of the Evidence Act 1950 as regards to the photographs tendered;

(b) failure by the prosecution to call the radiologist as x-ray was still ID38;

(c) failure by the learned trial judge to appreciate the DDA 1952 is a specific Act and all definitions provided under s 2 must be strictly applied; and

(d) the learned trial judge misdirected when His Lordship applied s 37(da) as custody and control was only proven not knowledge.

[6] We have read the petition of appeal, the record of appeal and the

submission of the parties in detail. We take the view the appeal has no merits. Our reasons, inter alia, are as follows:

(a) the appellant's complaint in respect of photographs or x-ray or s 90A, etc has no significant value per se, as the facts of recovery have not been challenged; and

(b) Learned counsel attempts to rely on s 2 of the DDA 1952 to argue that the offence cannot be sustained which reads as follows:

> Section 2 of the DDA refers to transit as 'taken or sent from any country and brought into Malaysia by land, sea, air or water (whether or not landed or transhipped in Malaysia) for the sole purpose of being carried to another country either by the same or another conveyance'.
>
> Parliament saw it fit to draft the statue in that manner. The Courts should not choose to apply or not section 2 in toto but must apply across the board viz. The courts saw it fit to apply trafficking under section 2 but are hesitant to apply transit under section 2. The courts cannot blow hot and cold air.
>
> The learned trial judge had preferred to apply the immigration act at the expense of the DDA. This is a misdirection.

[7] This part of the submission of learned counsel lacks clarity and the choice of words used to describe the courts' judgment trends in the path of contempt. In any event the accused was not arrested at KLIA but at Puduraya and in consequence the learned deputy public prosecutor's argument that s 2 of the Immigration Act 1959/63 will apply has merits. And we also do not see any relevance of the 'transit' and s 37(d) and 37(da) issues argued by counsel taking into consideration the factual matrix of the case. Further, the 'transit' argument as it stand has been rejected by the apex court (see *Isidro Leonardo Quito Cruz v Public Prosecutor* [2013] 2 MLJ 1 (FC); *Ong Lock Soon v Public Prosecutor* [2012] 2 MLJ 641 (CA) — where *Public Prosecutor v Jorge Enrique Pellon Tellon* [1998] 4 MLJ 183 was distinguished and/or not followed).

JURISPRUDENCE RELATING TO SS 2, 37(D) AND 37(DA) OF THE DDA 1952

[8] T Vijayandran an advocate and solicitor of the Malaysian Bar has written two enlightening articles relating to presumption under s 37(d) and 37(da) and mens rea of possession which sufficiently exposes the present status and judicial thinking in this area of jurisprudence, (see *Hanging on Two Inferences and Double Presumption* [2011] 1 MLJ xliii; *Mens Rea Possession* [2012] 6 MLJ lxiv). Decided cases will also show that offences under DDA 1952 are a developing subject which has not 'touched' the light at the end of the tunnel yet (see *Zaiful bin Muhammad v Public Prosecutor and another appeal* [2013] 2 MLJ 348; [2013] 2 CLJ 383; *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ

636 (26 June 2013)). In consequence of the issues raised by the appellant in this case it will be most appropriate to summarise the jurisprudence relating to this area of law in a concise manner, more so where the appellant has taken issue on s 37(d) and 37(da).

[9] Section 37(d) and 37(da) read as follows:

> 37(d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be *deemed to have been in possession* of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug. (Emphasis added.)
>
> 37(da) any person *who is found in possession* of … (ix) 40 grammes or more in weight of cocaine; … otherwise than in accordance with the authority of this Act or any other written law, *shall be presumed*, until the contrary is proved, to be trafficking in the said drug. (Emphasis added.)

[10] It is important to observe that s 37(d) uses the phrase 'deemed to have been in possession' and does not mention trafficking. And s 37(da) uses the phrase 'found in possession' (actual possession), and mentions trafficking. That is to say that s 37(d) may become operational the moment custody and control of the drugs is established; though case laws have placed caveat to say without proof of knowledge it is insufficient to apply the presumption of possession. In addition courts have asserted that knowledge has to be proven by direct or circumstantial evidence. And a further caveat to say that mere knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute possession, let alone trafficking. For example, in a case where husband and wife are staying in the same house and the husband with the knowledge of the wife in a locked room to the exclusion of the wife is involved in trafficking of drugs; based on the Federal Court decision of *Ibrahim Mohamad v Public Prosecutor* [2011] 4 CLJ 143, it is unlikely that a charge for trafficking or possession can succeed against the wife at the prosecution stage or at least at the defence stage based on her story of non-involvement and the fact the husband is the trafficker, and she has no custody or control. On the assumption she says that she has access to the room, she may be liable only for possession if the court accepts the story the husband is the trafficker based on the case of *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 and *Sochima Okoye v Public Prosecutor* [1995] 1 MLJ 538. *Radhi*'s case was followed in the case of *Sochima* where Justice Gopal Sri Ram JCA (as he then was) accepted the proposition that in law a person in possession of a dangerous drug would be entitled to an acquittal on a charge of trafficking by demonstrating either on a balance of probabilities or by raising a reasonable doubt that there is another who is the real trafficker. And if the wife is called to enter defence for possession, and if she is able to convince the court she has no 'animus possidendi', she will be entitled to an acquittal, (see *Chan Pean Lean v Public Prosecutor* [1956] 1 MLJ 237).

[11] Section 37(da) can only become operational once custody control, knowledge with actual possession has been established. That is to say, s 37(d) may assist the prosecution in all offences specified in DDA 1952 in relation to possession to satisfy the mens rea element but that will not be the case for the application of s 37(da) as it can only apply to a charge of trafficking. However, s 37(d) may assist to satisfy the elements of trafficking pursuant to s 2 to strengthen the mens rea of knowledge, to trade with or deal with the drugs (see *Mohd Nizar Fakhri bin Badri v Public Prosecutor* [2013] 2 MLJ 291).

[12] It must also be observed that the court has not prohibited the assistance of s 37(d) for purpose of establishing trafficking pursuant to s 2, though the court has prohibited the practice of the prosecution to rely on s 37(d) to establish mens rea for possession and thereafter rely on s 37(da) to drive home the charge of trafficking when the weight of the drugs exceeds the statutory amount specified in s 37(da). Such practice was referred to as double presumption and the Federal Court case of *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 propounded the rule against double presumption. The court held:

> To come to the presumptions of possession and knowledge under s 37(d) of the Act, one need only to arrive at a finding of having had 'in custody or under … control anything whatsoever containing' the drug whereas to arrive at the presumption of 'trafficking' under s 37(da), a finding of being 'in possession' of the drug is necessary. It would therefore be unduly harsh and oppressive to construe the automatic application of presumption upon presumption. Such a construction ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, here is not. Therefore, to constitute 'possession' under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder giving rise to the presumption of trafficking, there must be an express affirmative finding, not only a legal presumption, of possession as understood in criminal law, based on evidence. The word 'found' in s 37(d) must bear the same meaning as the word 'found' in s 37(da). Both require evidential materials in attaining proof thereof and are different from the word 'deemed' employed in s 37(d) (see pp 2881, 289A-C and 291G-H). Moreover, to read the presumption of possession provided in s 37(d) into s 37(da) so as to invoke against an accused a further presumption of trafficking would not only be ascribing to the phrase 'found in possession' in s 37(da) a meaning wider than it ordinarily bears but would also be against the established principles of construction of penal statutes and unduly harsh and oppressive against the accused. Any ambiguity in s 37(da) should be resolved in favour of the accused by placing the burden of proving possession of the substances involved on the prosecution. The trial judge had therefore erred in law by using the presumption of possession under s 37(d) of the Act to invoke the presumption of trafficking under s 37(da) thereof.

[13] The decision against the rule of double presumption will also make some part of the incidental proposition made before the above case otiose, where the courts readily allowed double presumption. For example, in

Mohamad Radhi bin Yaakob v Public Prosecutor [1991] 3 MLJ 169, where double presumption applied, the Supreme Court in relation to separate exercise of s 37(d) and 37(da) stated:

> In our opinion unless the evidence in a particular case does not obviously so warrant, it is incumbent for the court to consider whether on the balance of probabilities, the evidence of the defence has rebutted the statutory presumption of trafficking under s 37(da) as a separate exercise even though the court is satisfied on balance that the presumption of possession under s 37(d) has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction. (Emphasis added.)

[14] The separate exercise in dealing with s 37(d) and 37(da) to some extent now may only be relevant in the event the prosecution has charged for trafficking or in the alternative for possession. This panel has dealt with this issue in the case of *Tong Kam Yew & Anor v Public Prosecutor* [2013] 4 MLJ 888; [2013] 3 AMR 248, and held that in all capital punishment cases where there is no direct evidence of trafficking, it does not fall upon the court to rely on the presumption of trafficking (s 37(d) or 37(da)) to pave way for the accused to be convicted and hanged for trafficking when the prosecution has readily offered an alternative charge. On the factual matrix of the case the panel asserted that the court should have deliberated on the issue of possession before applying its mind to trafficking. That is to say when there is actual evidence of trafficking (usually will be made out through agent provocateur or inferences as propounded by *Akif*'s case) independent of the presumption of s 37(d) or 37(da) the charge for trafficking can be sustained notwithstanding both presumption will apply pursuant to s 4 of the Evidence Act 1950 ('EA 1950'). However, when the prosecution relies on s 37(da) to assert trafficking but also has offered an alternative charge of possession the court is obliged to consider the alternative charge of possession, as per decided cases which was dealt in the case of *Tong Kam Yew*.

[15] Basically s 2 can only apply when there is some evidence of sale or dealing etc; to attract mens rea relating to the word trafficking. As said earlier it may be established through agent provocateur or through inference. If it cannot be established by such means then it may be established by relying on s 37(da) or with some support of s 37(d). We will elaborate in this judgment how s 2 will be applicable in cases where drugs are found in the stomach and later recovered upon excretion, and how ss 2 or 37(d) or 37(da) may apply independently or in composite.

[16] What s 37(d) or 37(da) attempts to do is that it effectively changes the common law position which requires actus as well as mens rea for criminal culpability. However, the fact that it uses the word 'presumption' does not mean s 37(d) or 37(da) independently can stand to say the accused is guilty of

the offence. It only pushes on to the accused some burden to explain his involvement relating to the drug which is said to be in his custody, control and possession by fact or law (see *Public Prosecutor v Yuyaraj* [1969] 2 MLJ 89 (PC); *Lee Chee Meng v Public Prosecutor* [1992] 1 MLJ 322; [1992] 1 CLJ 345).

[17] Section 37(d) or 37(da) also effectively changes the burden of proof placed on the prosecution in some aspect by whittling the test laid down in *Woolmington v Director of Public Prosecutions* [1935] AC 462 — ie the beyond reasonable doubt test (see *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281). And also places the burden on the accused to rebut the statutory presumption on the balance of probabilities. If accused fails to do so conviction will result. However, the concession for the accused is that notwithstanding s 37(d) or 37(da) attempts to place an onerous burden on the accused in contrast to the common law position, over the years courts have whittled down the 'test of balance of probabilities' in favour of the accused to an extent that it is sufficient if the story of the accused is not inherently incredible and that story when tested with prosecution case creates a doubt in the mind of the judge as advocated in *Sochima*'s case and which this panel has dealt with in a number of cases (see (a) *Munuswamy Sundar Raj v Public Prosecutor* [2013] 5 MLJ 48; [2013] ILNS 183; (b) *Zulkifli bin Md Rodzi v Public Prosecutor* [2013] 3 MLJ 745; [2013] 4 CLJ 250; (c) *Rozmi bin Yusof v Public Prosecutor* [2013] 5 MLJ 66; [2013] 4 CLJ 384; (d) *Tong Kam Yew & Anor v Public Prosecutor* [2013] 4 MLJ 888; [2013] 3 AMR 248).

[18] In actual fact the so called burden on the balance of probabilities in drug cases have become illusory through the ingenuity of the counsel or courts, all for the single purpose of ensuring that a probable innocent person is not convicted by presumption, inference and statutory imposition in breach of art 5(1) of the Federal Constitution which says:

> No person shall be deprived of his life or personal liberty save in accordance with law.

What these presumptions have achieved is that it has now forced the accused to speak of his innocence when that was not the position under the common law.

[19] Strictly speaking the law does not require for the presumption to be invoked per se by the judge. Presumption of law under s 4 of the EA 1950 attaches by operation of law as long as the basic elements are satisfied. Thus, there could be actual custody control, possession inclusive of positive act of trafficking to attract s 2 of the DDA 1952 but that does not mean the statutory presumption is not in place. Whether the trial judge says in his grounds of judgment that it is a finding of actual possession or he is invoking the statutory presumption is immaterial as far as s 4 of the EA 1950 is concerned. The statutory presumption attaches by operation of law, and in consequence the

accused must in his defence speak of his innocence as advocated in *Sochima*'s case to obtain an acquittal. However, judicial decisions may not have strictly taken into consideration s 4 of the EA 1950 and have often used the word 'invoke' which is superfluous in the light of s 4 of the EA 1950.

[20] Section 37(d) and 37(da) introduces the concept of rebuttable presumption of law, and not irrebuttable presumption. It has its origin from common law and is reflected in s 4 of the EA 1950. The said section reads as follows:

> 4 (1) Whenever it is provided by this Act that the court may presume a fact, it may either regard the fact as proved unless and until it is disproved, or may call for proof of it.
>
> (2) Whenever it is directed by this Act that the court shall presume a fact, it shall regard the fact as proved unless and until it is disproved.
>
> (3) When one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

One or two paragraphs of *Janab's Key To Criminal Procedure and Evidence* (2nd Ed), by Hamid Sultan Abu Backer, at p 646 explains the concept and reads as follows:

> Presumption of Law
>
> These are really rules of substantive law in disguise. Though they are often referred to as presumptions they are actually rules of substantive law which affect the normal principles of burden and standard of proof. For example, section 82 of the penal code states that nothing is an offence which is done by a child under 10 years of age. Such conclusive presumption is also referred to as irrebuttable presumption of law. Once the basic fact that the child is under 10 years old is proved, the fact that the child can commit no offence is presumed, and no evidence can be admitted to rebut this.
>
> Presumption of law can mean both irrebuttable and rebuttable presumption. Irrebuttable presumptions are conclusive presumptions of law wherein the court will not allow any evidence to contradict it. Rebuttable presumptions of law are presumptions which the court will allow evidence to contradict it. For example, a man is innocent until proven guilty, or a child if born in wedlock shall be presumed legitimate unless it is disproved, are rebuttable presumptions of law. Presumptions of law take place when the party bearing the evidential burden has adduced evidence in support of a primary fact and as a result, a presumed fact is deemed to exist.

[21] Trafficking of drugs alone attracts death penalty under the DDA 1952. A dictionary meaning of trafficking in drugs will generally mean illegal trading of drugs. However, s 2 of the DDA 1952 gives an extended meaning to

trafficking to specifically include at least 18 types of conduct and the said definition is not exhaustive. Section 2 of the DDA states:

> 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act.

[22] Section 39B(1)–(2) makes trafficking an offence and imposes a death penalty for the offenders. The said s 39B(1)–(2) reads as follows:

> 39B (1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia —
>
> (a) traffic in a dangerous drug;
>
> (b) offer to traffic in a dangerous drug; or
>
> (c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug.
>
> (2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death.

[23] It must be observed that the amount of drugs in a case of actual trafficking is not a criterion under the section to attract death penalty (see *Public Prosecutor v Suzie Adrina bte Ahmad* [2006] 5 MLJ 135). In practice the attorney general chambers will not charge an offender to attract death penalty unless it exceeds the statutory maximum as provided in s 39A(2) even though s 39A(2) is not applicable to actual trafficking. In *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64, the Singapore position was stated as follows:

> If nothing more is proved against an accused than the mere fact that he had the controlled drug in his possession, then an offence under s 6 is established but the graver offece under s 3 of trafficking is not, however large may be the quantity of the controlled drug involved.

[24] Judicial thinking in the past was that passive possession or conduct was sufficient to satisfy the criteria set out in s 2 of the DDA. That is to say the actus reus was itself sufficient to establish a prima facie case. The position was reflected in the Federal Court case of *Teh Geok Hock v Public Prosecutor* [1989] 3 MLJ 162 and summarised by Augustine Paul J in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 as follows:

> It must be observed that most of the acts that constitute 'trafficking' as defined in s 2 of the Act like, for example, keeping, concealing, storing, transporting and carrying dangerous drugs involved the prerequisite element of possession unlike, for

instance, the sale and supply of dangerous drugs which need not necessarily involve possession as demonstratged by *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560. It follows that a person cannot keep, conceal, store, transport or carry dangerous drugs within the meaning of 'trafficking' in the Act without being in possession of them. Proof of further facts to establish any one of these acts is therefore sufficient to make out a case of trafficking. Thus, it is true, as the (then) Supreme court observed in *Teh Geok Hock v Public Prosecutor* [1989] 3 MLJ 162 that '… the definition in the Act sounds artificial and not according to the ordinary meaning of the word 'trafficking' which is normally understood to mean to trade in, buy or sell, any commodity, albeit often the sinister implication' (at p 163). The offence is therefore complete upon proof of the relevant act that constitutes 'trafficking' as defined in s 2 of the Act and the purpose of such act is not material.

[25] Within two years the judicial thinking in Malaysia moved to include the element of mens rea relating to trafficking per se to attract s 2 of the DDA, similar to the position in Singapore even though their Act was differently worded and as reflected in the Singapore case of *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64, where Lord Diplock sitting in the Privy Council on mens rea had this to say:

In Their Lordship's view the immediate context of the verb 'transport', to which attention has been drawn, attracts the *maxim noscitur a sociis*. This, and the fact that it appears in the definition of the verb to 'traffic', of which the natural meaning in the context of trafficking in goods involves dealings between two parties at least, and that the evident purpose of the Act is to distinguish between dealers in drugs and the unfortunate addicts who are their victims, all combine to make it clear that 'transport' is not used in the sense of mere conveying or carrying or moving from one place to another but in the sense of doing so to promote the distribution of the drug to another. Supplying or distributing additive drugs to others is the evil against which s 3 with its draconian penalties is directed.

[26] In the Malaysian context Augustine Paul J corrected the previous position of his judgment in *Public Prosecutor v Mohd Farid bin Sukis & Anor* [2002] 3 MLJ 401, to include mens rea as follows:

I pause to note that my analysis of the acts specified in s 2 of the Act in *Public Prosecutor v Hairul Din bin Zainal Abidin* [2001] 6 MLJ 146 must be read against this background. Thus, the mere act of, say, 'keeping', or 'concealing' or 'carrying' dangerous drugs as enumerated in s 2 of the Act will not constitute 'trafficking' without any further evidence of an intention to trade or deal in them.

[27] The mens rea element for trafficking can be established by direct evidence for example in a case where the sale of drugs has been negotiated and purchased. Section 37(d) generally cannot assist to sustain a charge of trafficking because of the requirement that there must be some mens rea element of trafficking ie by sale or otherwise. This will not be the case where

s 37(da) becomes applicable to the drugs specified in the *said section only*. (Emphasis added.) Where direct evidence is not available s 37(d) may assist the prosecution for possession only as a matter of law once the prosecution has established custody and control of the drugs, even though it is now well established that custody and control is not the only 'sine qua non' to attract s 37(d) and the court requires further evidence to satisfy the mens rea element of custody and control per se. For example, in *Choo Yoke Choy v Public Prosecutor* [1992] 2 MLJ 632 the Supreme Court took the view that the fact that drugs was found in the room of the accused was not sufficient to prove the accused had sole custody and control, ie the element of 'sole custody' was seen to be an added criteria. The supreme court went on to say once the prosecution proves the accused has custody or control over it then the presumption arises that the accused is in possession of the dangerous drugs and knows its very nature to attract s 37(d).

[28] It is also well settled that possession per se need not be exclusive. It all depends on the facts and circumstances. As early as 1956 Taylor J has attempted to set down some guidelines in the case of *Leow Nghee Lim v Reg* [1956] 1 MLJ 28 where it was stated:

> The dictionary definition brings in the idea of exclusiveness. It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.

[29] In *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237 the court asserted the mens rea for possession will be complete if the possessor can deal with as if it belonged to him, in the following words:

> The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi.

And the Supreme Court in *Public Prosecutor v Kau Joo Huat* [1988] 2 MLJ 91; [1988] 1 CLJ Rep 258 had asserted that 'power of disposal' is not an essential ingredient in dangerous drug case.

[30] The issue of 'custody and control' was well explained by Visu Sunnadurai J in the case of *Public Prosecutor v Ramli Long & Anor* [1993] 1 MLJ 93 as follows:

Occupires

To establish custody and control over the drugs found in the pondok or to establish that the accused persons had knowledge of the drugs, the prosecution must establish occupancy of the pondok by the accused persons.

There is, however in the present case, no other evidence to establish occupancy of the pondok by the accused persons, except for the keys found at no 62 to the door to the pondok and the electricity bill for the pondok being found also at no 62.

It appears to this court that in the absence of any other evidence, occupancy of the pondok cannot be conclusively established by these two factors alone. There is not an iota of any other evidence of occupancy of the pondok by both accused. There were no personal items found there, the accused persons were not found in the pondok during the time of the raid; nor was there any evidence even to establish that they were at any time seen at the pondok. Even the evidence of Mat bin Daros, who previously occupied the pondok and whose name still appears on the electricity bill, did not raise any indication that either or both of the accused persons had occupancy of the pondok.

[31] In addition, His Lordship Zulkefli Makinuddin CJM in *Ibrahim Mohamad v Public Prosecutor* [2011] 4 CLJ 113 had this to say:

The law is well settled that having only custody or control over the said drugs is insufficient to establish 'possession'. The physical act of custody or control must be accompanied with evidence that the accused had knowledge of the said drugs. In the absence of any statutory presumption, knowledge has to be proved either by direct evidence or circumstantial evidence. Mere knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute possession, let alone trafficking.

[32] The courts in the past have taken a restrictive approach to find culpability on the issue of 'mens rea' element or 'knowledge' relating to possession as some of the cases will demonstrate. For example:

(a) as early as 1955, Thompson J in *Tong Peng Hong v Public Prosecutor* [1955] 1 MLJ 232 in relation to s 37(d) to distinguish a bag and what it contains, stated that the knowledge of the contents was considered to be important to attract mens rea rather than holding the bag. Similar sentiments were expressed by Taylor J in *Leow Nghee Lim v Reg* [1956] 1 MLJ 28; to say:

> A man must know of the existence of a chattel and have some idea of its whereabouts before he can exercise any control over it. The word possession therefore implies some knowledge but not necessarily full or exact knowledge.

(b) the above proposition was further emphasised by Yong J in the case of *Saad Ibrahim v Public Prosecutor* [1968] 1 MLJ 158 where His Lordship asserted:

A In my opinion mere possession is one thing and possession with mens rea is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of mens rea. Without mens B rea possession cannot be criminal except in certain cases created by statute, which is not applicable in this case.

(c) The Supreme Court in *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 adopted a similar proposition as the above cases and Edgar Joseph C Jr SCJ (as he then was) had this to say:

We need hardly add, that even if the appellant had known of the presence of the heroin in his bedroom, that by itself would not have been sufficient to establish that he was in possession or in control of it given the fact that others D too, and certainly his girlfriend Tan Ah Kwai, had access to the bedroom and could have concealed the heroin there. At the end of the day, this was a case of the proverbial cap which might have fitted not just the head of the appellant but that of others as well.

E **[33]** All the above cases will demonstrate that there was a greater task for the prosecution to establish the mens rea element relating to custody and control to rely on presumption until the Federal Court case in *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1 (*Akif*'s case).

F **[34]** *Akif*'s case has in actual fact made it much easier for the prosecution to establish actual possession by inference of knowledge. The Federal Court went to say that a package recovered from the car (which was not truly concealed), will give rise to a strong inference that the driver of the car had knowledge of the G contents and was sufficient to trigger a charge of trafficking. Section 37(d), 37(da) as well as s 2 of the DDA were considered. The facts and circumstances of the case were such that the court held that there was in fact actual possession. The facts of the case can be summarised as follows:

H (a) the accused (driver) charged for trafficking dangerous drugs, on the basis that packets from the passenger's seat of the car were recovered. The accused defence was that he knew the packages were put in the car by a third party but he did not know they contained drugs;

I (b) the accused had given a caution statement where he had confessed that he was transporting the drugs, for sale. The caution statement was admitted and it was the finding of the judge that there was trafficking as defined in s 2 of the DDA 1952;

(c) the learned judge went to conclude that the respondent failed to raise any

reasonable doubt on the prosecution's case and failed to rebut the statutory presumption under s 37(da) on the balance of probabilities and sentence him to death;

(d) the Federal Court went to say that the Court of Appeal having held that the caution statement was wrongly admitted, the court should have looked for other evidence to sustain a conviction;

(e) the Federal Court asserted that there must be a physical element as well as a mental element which must both be present before possession is made out (see *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650). On this issue the Federal Court had this to say:

> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi. *Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances.* Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or have done something with it that shows such an intention. Or it must be clear that the circumstances in which it is found show such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. *The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the court that the person who is physically in a position to deal with the thing as his own had the intension of doing so.* (Emphasis added.)

(f) the Federal Court also asserted that what constitutes 'possession' under s 37 of the Act is a question of law but, however, it is a question of fact whether in a given case a person can be said to be in possession of something. On the facts of the case the court went to say that the presence of three packages in the car without a plausible explanation from the respondent could give rise to a strong inference that he had knowledge that the packages contained drug or things of similar nature. To drive

home the point the court relied on the following cases namely:

(i) *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633 where it was stated:

> 21. For the element of 'possession' (within the meaning of s 17 of the Misuse of Drugs Act) to be established, it must not only be shown that the accused had physical control of the drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as to the contents of what he was carrying: see *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256; *Tan Ah Tee & Anor v Public Prosecutor* [1980] 1 MLJ 49; [1078–1979] SLR 211. In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.
>
> 22. We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible. As Yong Pung How CJ remarked in *Public Prosecutor v Hla Win* [1995] 2 SLR 424 (at p 438):
>
> > In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstance of the particular case, giving due weight to the credibility of the witnesses.

(ii) *Ramis a/l Muniandy v Public Prosecutor* [2001] 3 SLR 534 where it was stated:

> Knowledge of drugs
>
> The starting point in the consideration of this issue was that we had already concluded that the drugs was already on Ramis's motorcycles when he entered the vicinity and that he had physical control of the drugs. In the absence of any reasonable explanation by Ramis, these facts were sufficient to lead to a strong inference that Ramis knew that the bag found on his motorcycle contained drugs.

(iii) *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356, where Lord Reid at p 367 said as follows:

> The object of this legislation is to penalise possession of certain drugs. So if mens rea has not been excluded what would be required would be the knowledge of the accused that he had prohibited drugs in his possession. It

would be no defence, though it would be a mitigation, that he did not intend that they should be used improperly. And it is commonplace that, if the accused had a suspicion but deliberately shut his eyes, the court or jury is well entitled to hold him guilty. Further, it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in his possession. Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. So it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession. That would not lead to an unreasonable result.

and Lord Morris stated as follows:

If there is assent to the control of a thing, either after having the means of knowledge of what the thing is or contains or being unmindful whether there are means of knowledge or not, then ordinarily there will be possession. If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then, ordinarily, I would suppose that there would not be possession. If, however, someone deliberately assumes control of some package or container, then I would think that he is in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them.

(g) the Federal Court went to say in exclusion of the caution statement s 37(d) would have applied to find for possession. However, based on the above Singapore cases relied on, the court went to say that the facts of the case in exclusion of the caution statement, there was evidence by inference of actual possession to attract s 37(da) to sustain the charge of trafficking. That part of the judgment reads as follows:

[23] It is true that the trial judge did not make any finding on the issue of knowledge necessary to establish possession of the drugs, as he relied on the cautioned statement in coming to his finding. The Court of Appeal on the facts correctly found that there was sufficient evidence to find the respondent to be in custody and control of the three packages found in the car and relying on the presumption under s 37(d) of the Act the Court of Appeal went on to hold that the respondent was in presumed possession of the drug.

[24] Applying the observations set out in the authorities cited above to the facts in the present case, the irresistible inference that may be drawn in the circumstances is that the respondent all along knew about the drug found in the car. The fact that they were found hidden under the seats of the car and wrapped in Chinese newspaper would not assist him to negate such an inference. From the evidence of PW5 it is clear that little effort was required to uncover what was contained in the three packages. Therefore, we are of the

view that on the facts and in the circumstances of this case the learned trial judge, properly directed on the law, would have come to the finding that prima facie the respondent had possession of the drug independent of the statutory presumption under s 37(d) of the Act.

[35] The finding of the High Court as well as the grounds of the Court of Appeal had been eloquently summarised by His Lordship Arifin Zakaria FCJ (as he then was) as follows:

> [10] The learned trial judge found that the respondent has custody and control over the said cannabis at the time of the arrest. And since the cannabis was found in the car driven by the respondent, this goes to prove that the respondent was transporting the cannabis to Jalan Kubur. Besides that the respondent had through his caution statement confessed to the fact that he was transporting the said cannabis to Jalan Kubur for sale. The learned trial judge held that the element of trafficking as defined in s 2 of the Act was thus satisfied. On the totality of the evidence, the learned trial judge found that the respondent failed to raise any reasonable doubt on the prosecution's case and failed to rebut the statutory presumption under s 37(da) on the balance of probabilities. The respondent was found guilty for trafficking under s 39B(1)(a) of the DDA of the Act and sentenced to death.
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> FINDINGS OF THE COURT OF APPEAL
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> [11] Gopal Sri Ram JCA, delivering judgment of the Court of Appeal, stated that the main issue in the appeal was directed at the admission of the cautioned statement allegedly made voluntarily by the respondent two days after his arrest.
>
> [12] On this issue, the Court of Appeal agreed with the submission for the defence that the learned trial judge ought not in the circumstances of the present case to have admitted the cautioned statement. On that premise the Court of Appeal held that the charge of trafficking cannot be sustained, thus setting aside the conviction and sentence imposed by the High Court and substituted the same with the offence of possession under s 6 of the Act, punishable under s 39A(2) of the Act. The respondent was sentenced to 18 years imprisonment and ten strokes.

[36] To summarise the above it can be said:

(a) s 37(d) will be applicable to all offences under DDA 1952;

(b) s 37(da) will only apply when there is finding of actual possession, and can sustain a charge of trafficking; and

(c) actual possession can be established by inference provided the mental state of knowledge can be established from all facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.

[37] One must read with caution the case of *Akif* as not in all cases where drug is found in a car will attract 'inference' and s 37(da). It all depends on the facts as the Federal Court case of *Ibrahim Mohamad & Anor v Public Prosecutor*

[2011] 4 CLJ 113 will demonstrate. In *Ibrahim*'s case there were two persons in the car and drug was recovered in the back seat. Both the persons were charged for trafficking and sentenced to death by the High Court and affirmed by the Court of Appeal. However, the Federal Court reduced the charge of trafficking to one of possession. Zulkefli Makinudin FCJ (as he then was) held as follows:

(1) Possession is an important ingredient in a charge of trafficking. Unless direct evidence of trafficking is adduced, the prosecution must prove the ingredient of 'possession' and the trial judge must make an affirmative finding of 'possession' before the presumption of trafficking under s 37(d) of the Act can be invoked (para 6).

(2) Neither one of the accused were the registered owner of the vehicle. The registered owner of the vehicle was never called as prosecution witness. The courts below concluded that the second accused had custody and control over the drugs on the mere fact that he was a passenger of the vehicle when he was arrested and that several months prior to his arrest the second accused was summoned for driving the vehicle without licence in Kedah. There was nothing to suggest as to what happened to the vehicle in between the period he was summoned in Kedah until the date of his arrest. A fact cannot be proved by presumption. A finding must be made based on proved facts or inferences drawn from proved facts. It followed that there was no evidence to prove that both accused were exclusively in custody and control of the vehicle prior to their arrest (para 8).

(3) There were many favourable inferences that could be made to both accused from the existing factual matrix of the case. The vehicle could have been rented to a third party or the registered owner of the vehicle could have taken possession of the vehicle after the second accused's summons incident in Kedah. Those favourable inferences were never considered by the courts below which casted a reasonable doubt on the element of custody and control. The failure of the courts below to consider that issue was misdirection in law (para 9).

(4) Notwithstanding that the prosecution has complete discretion as to the choice of witnesses to be called at the trial, it has a duty to call all necessary witnesses essential to the unfolding of the narrative of the prosecution's case. In the present case, the question as to how the vehicle came to be in the custody and control of both accused still remained unanswered. The registered owner of the vehicle was the one that held the key to the unfolding of the events without which there were gaps in the prosecution's case (para 10).

(5) There was a danger of relying on a tip-off case as there was a possibility that the drugs might have been planted in order to implicate the accused (see *Abdullah Zawawi Yusoff v Public Prosecutor*). The prosecution must exclude possibilities that other individuals might have had access to the drugs. In the present case, the prosecution failed to adduce evidence that the registered vehicle owner and/or other individuals had no access to the vehicle prior to the date of arrest of both accused. Further, the courts

below erroneously took the position that the failure to call the registered vehicle owner was not fatal as he was not together with both accused when they were arrested (para 12).

(6) If for some valid reasons the registered vehicle owner could not be called to give evidence, his statement ought to have been adduced and tendered as evidence pursuant to s 32(1)(i) of the Evidence Act 1950. That raised the question as to who was in actual control of the vehicle immediately prior to the date of arrest of both accused. Further, there was no evidence to indicate for how long both accused had possession of the vehicle (para 13).

(7) Whilst the conduct of the accused fleeing the scene was a relevant factor for consideration, such conduct must be weighed against the circumstances of the case. The prior conduct of both accused to show they lacked the mens rea of knowledge was relevant under s 8(2) of the Evidence Act 1950. The first accused did not make a U-turn or attempt to run away before approaching the relevant road block which could be easily seen by him on the straight road. That gave rise to an inference that both accused had no knowledge of the drugs in the vehicle. Further, they had co-operated with the police. If they had prior knowledge of the drugs, they would have bolted immediately upon being asked to alight from the vehicle or upon reaching the road block. The conduct of both accused was consistent with their contention that they had only fled upon being told that there were drugs in the vehicle. Their conduct was consistent with the act of an innocent man who would have panicked to evade arrest when wrongly suspected of committing a crime. Both accused had put forward sufficient explanation as to their conduct of running away from the scene of the crime. They had discharged the onus of explaining their conduct as provided for under s 9 of the Evidence Act 1950 (paras 17–19 and 21).

(8) It was not safe to convict both accused on the charge of trafficking under s 39B(1)(a) of the DDA. However, since both accused were in possession of the vehicle where the drugs were found, the presumption under s 37(d) of the DDA was applicable and they were deemed to be in possession of the drugs. As the law did not permit double presumption, both accused could not be said to be trafficking in the drugs in the absence of any other evidence to show that there was direct trafficking. Hence, the conviction was substituted with one of possession under s 6 of the DDA, punishable under s 39A(2) of the DDA read with s 34 of the Penal Code. As a large quantity of the drugs were found in the possession of both accused, a sentence of 20 years' imprisonment and the mandatory ten strokes of whipping were appropriate.

[38] The Federal Court case of *Akif* and *Ibrahim Mohamad* can be easily distinguished from the example of husband and wife which we have stated earlier.

THE SUBMISSION OF THE APPELLANT

[39] The appellant submission that it was wrong for the judge to apply

s 37(da), as custody and control was only proven and not knowledge, has no merits for reasons stated above and we will add as follows:

(a) the fact that the drugs were found in the stomach and recovered when excreted will satisfy the element of custody, control inclusive of possession by operation of law by virtue of s 37(d) itself. In addition the fact that it was concealed in the stomach and was transported will at least attract more than two grounds stated in s 2 of the DDA 1952 ie concealing, transporting, etc. The positive element as opposed to the passive conduct to show intention to trade or deal in the drugs to attract trafficking will be satisfied by the irresistible inference proposition advocated in many cases inclusive of *Akif* to drive home the charge of trafficking pursuant to s 2 of the DDA 1952 itself and without any reliance of s 37(d) or 37(da); and

(b) in addition on the factual matrix of this case without reliance of s 2 of the DDA 1952 and s 37(d) per se trafficking can be established pursuant to s 37(da) by applying the irresistible inference proposition. In consequence leaving aside the reasoning of the learned judge on s 37(da) on the factual matrix of the case a charge of trafficking can be sustained by application of s 37(da). On similar facts His Lordship Azahar Mohamed JCA had in the case of *Kasanda Emmanuel lwn Pendakwa Raya* [2013] 2 MLJ 833 had this to say:

> (1) The appellant did in fact know of the existence of the drug in each of the oval rubber pellet as the 37 oval rubber pellets were swallowed by him. Therefore, the appellant had physical custody and control of the drugs in each of the oval rubber pellet that he swallowed. As the weight of the drugs was 159.82g which was above the statutory weight, hence the presumption of 'trafficking' under s 37(da) of the DDA was applicable (see para 10).
>
> (2) SP6 had explained the reasons why in certain cases the foreign property was not visible in the x-ray film. According to SP6, if there was a lot of stool in the intestines area, it would prevent the foreign property from being visible in the x-ray film. Such opinion could be given by any medical officers without requiring a radiologist to testify. Hence, the failure of the prosecution to adduce the relevant x-ray film did not at all affect the prosecution's case as the x-ray film did not have any role to strengthen the prosecution's case or affect the appellant's defence (see para 13).
>
> (3) Although the photographs P14A-H did not show the face of the person defecating, the evidence of SP3 and SP4 was very strong in proving that the person in the photograph, was none other than the appellant (see para 14).
>
> (4) The clothes and the slipper was non-issue in this case; the drugs,

heroin and monoacetylmorphines which were the subject matter of the charge was not found in the appellant's clothes or the slippers (see para 16).

(5) The difference in the evidence of SP3 and SP1 as to the colour of the substance contained in the oval rubber pellet did not affect the prosecution's case. The learned judicial commissioner was correct in applying the principle enunciated in the case of *Wan Yuriilhami bin Wan Yaacob lwn Pendakwa Raya dan satu lagi rayuan* [2009] 2 MLJ 383 that it was not impossible for two or more persons who had seen the same thing gave a different description, depending on the meticulousness of the person. The chain of the movement of the case material which was discharges from the appellant's anus until it being produced in the court was not broken.

On similar facts a conviction was sustained in a number of cases to name a few are as follows:

(a) *Isidro Leornardo Quito Cruz v Public Prosecutor* [2013] 2 MLJ 1; and

(b) *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259.

[40] The Federal Court decision in *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194; [2009] 2 CLJ 209 attempts to say that discovery of the drugs through the accused even in the absence of confession or the application of s 27 of the EA 1950 can trigger s 37(da), thereby whittling the conservative approach taken in previous cases. Abdul Aziz Mohamad FCJ had this to say:

> The oral statements made by the respondent to Raja Aziz on the night of the raid were, in this court's judgment, properly admitted. The statement about the cannabis being under the bed meant that the respondent knew of the existence of the cannabis in his bags. The trial judge was thus right in finding that the respondent was in possession of the cannabis. In fact, even if the respondent's statement were to be overlooked, the fact that the respondent, in the circumstances, brought out from under the bed the bags containing the cannabis was itself sufficient as complete and direct proof that he had knowledge of the existence of the cannabis in the bags and was, therefore, in possession of it. With such proof of knowledge, it was unavailing as a defence to suggest that the presence of the cannabis in the respondent's bags was the result, unknown the respondent, of the work of someone who had access to the house and the respondent's room.

[41] The Federal Court in *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630, considered the cases of *Chan Pean Leon*, *Akif* and *Denish* and further whittled down the scope of exclusiveness in respect of possession. Ahmad Hj Maarop FCJ on the facts had this to say:

> So, in our judgment in the circumstances of this case, the presence of the ladies clothing (two female upper garments and two pairs of female jeans) along with male clothing in the third room of the first house does not mean that no possession was

established against Siew. The crucial question is whether Siew was so situated with respect to the proscribed drugs found in the second and third rooms of the first house that he had the power to deal with the drugs as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need. In other words, Siew must be so situated that he can deal with the proscribed drugs as if it belonged to him, and it must be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so (he had animus possidendi). Invariably this is a fact which can only be proved by inference from surrounding circumstances of this case. It must be clear from the circumstances in which the proscribed drugs were found, that Siew had the intention of dealing with the drugs as if they belonged to him. The list of such possible circumstances is not exhaustive.

[42] Moving from one place to another with controlled drugs that too in large quantity may also attract s 2 of the DDA 1952 by way of inference. In *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 Lord Diplock had this to say:

Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible — even if there were no statutory presumption such as is contained in s 15 of the Drugs Act.

As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it.

[43] As we have said earlier s 37(d) or 37(da) comes into force by operation of law with a caveat thats 37(da) cannot be sustained if s 37(d) necessarily have to be used to supplement the ingredient of knowledge ie rule against double presumption. It does not matter on issues of law what the trial judge says about ss 2 or 37(d) or 37(da) if there is overwhelming evidence of trafficking according to law, the appellate court is at liberty to apply s 60 of the Courts of Judicature Act 1964 if the law requires a conviction. The application of s 37(d) or 37(da) only imposes the accused to speak of his innocence to earn a conviction for possession or obtain an acquittal. Nothing more.

[44] It is well settled that it is in the hands of triers of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction as well as sentence. We have perused the evidence in detail and we are satisfied that there are sufficient material to support the charge and the view

taken by the trial court on the relevant issues in our view was a reasonable view of the evidence on record, and the court had followed *Radhi*'s direction and rightly applied the maximum evaluation and beyond reasonable doubt test.

[45] We are of the considered view it is a safe decision and appellate intervention is not warranted and the appeal has no merit. Accordingly we dismiss the appeal.

[46] We hereby order so.

Appeal dismissed.

Reported by Ashok Kumar